No. 15626

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

WONG HO, as Guardian *ad Litem* of WONG KWOK WEI,
*Appellant,*

*vs.*

JOHN FOSTER DULLES, as Secretary of State,
*Appellee.*

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## BRIEF FOR APPELLEE.

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LAUGHLIN E. WATERS,
*United States Attorney,*

RICHARD A. LAVINE,
*Assistant U. S. Attorney,*
*Chief of Civil Division,*

JAMES R. DOOLEY,
*Assistant U. S. Attorney,*
600 Federal Building,
Los Angeles 12, California,
*Attorneys for Appellee.*



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## BRIEF FOR APPELLEE.

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### Jurisdiction.

The District Court had jurisdiction of appellant's action to be declared a national of the United States under the provisions of Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A. §903. Since its judgment [R. 20-21][1] was a final decision, this Court has jurisdiction of an appeal from that decision pursuant to 28 United States Code, Section 1291.

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[1]"R." refers to the printed Transcript of Record. "Br." indicates references to Brief for Appellant. Exhibits will be indicated by "Ex.". Exhibits followed by numbers are those of appellant (plaintiff) while exhibits followed by letters are those of appellee (defendant).

## Statement of the Case.

On April 23, 1951, appellant and his alleged brother, Wong Kwok Keung, instituted an action in the United States District Court for the Northern District of California, seeking a judgment declaring them to be nationals of the United States [R. 3-9]. On June 29, 1956 their action was transferred to the Court below [R. 15].

On October 5, 1956 appellee filed and served upon counsel for appellant a Notice of Taking Deposition on Oral Examination. This notice provided for taking the deposition of Dr. I. S. Bergius, a resident of Hong Kong, B. C. C. before a Vice Consul of the United States in Hong Kong. Appellant interposed no objection to this notice.

Trial commenced at Los Angeles, California on January 22, 1957 [R. 27]. During trial the deposition of Dr. Bergius [Ex. C] was received in evidence over objection of counsel for appellant [R. 175-177]. Attached to this deposition was a radiograph of appellant [Ex. C] taken on March 14, 1951, when appellant, according to his claimed birthdate (April 30, 1935) would have been 15 years, 10 months, and 14 days of age. There was also received in evidence an X-ray of appellant made on January 31, 1952 [Ex. 13].

In his deposition Dr. Bergius concluded from the radiograph of March 14, 1951 that appellant was then 9 to 10 years of age [Ex. C, p. 5]. Dr. George Jacobson, *an expert witness called on behalf of appellant* concluded from the same radiograph that appellant was between 10 and 11

years of age ("closer to the 10 year standard") [R. 240-241, 243, 248-249].

At the conclusion of the trial the District Court found that appellant was "considerably younger than his claimed age" [R. 19] and that he "has not sustained his burden of proving that he is the true and lawful blood son of Wong Ho; nor has said plaintiff sustained his burden of proving that the person who purports to be Wong Kwok Wei, in in truth and in fact Wong Kwok Wei" [R. 19]. The court below concluded that appellant had failed to sustain his burden of proving his claim to United States citizenship and/or nationality, and entered judgment denying the relief for which appellant prayed [R. 19-20]. Judgment was entered declaring appellant's alleged brother, Wong Kwok Keung, to be a national of the United States [R. 24-25].

## Issues Involved.

1. Did the District Court err in admitting, over objection, appellee's Exhibit C?

2. Did the District Court err in concluding that appellant had failed to sustain his burden of proving his claim to United States nationality?

## Statutes Involved.

Section 1993 of the Revised Statutes of the United States, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, provides:

> "Any child hereafter born out of the limits and jurisdiction of the United States, whose father or

mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A. §903, provides in pertinent part:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad may institute an action against the head of such Department or agency in the District Court of the United States for the district of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *"

## ARGUMENT.

### I.

### The District Court Did Not Err in Admitting, Over Objection, Exhibit C.

Exhibit C, the deposition of Dr. Iain S. Bergius, was received in evidence by the District Court over objection of counsel for appellant [R. 175-177]. Ample authority for the receipt of this exhibit is found in Rule 26(d)(3), Federal Rules of Civil Procedure, which provides in pertinent part as follows:

> "(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or *who had due notice thereof,* in accordance with any one of the following provisions:
>
> * * * * * * *
>
> "(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: * * * 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; * * *" (Emphasis added).

Rule 26(d) is substantially the same as former 28 U. S. C. §641[2] providing for the use of depositions taken *de bene esse* (see, Notes of Advisory Committee on

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[2]Section 865, Revised Statutes of the United States.

Rules, 28 U. S. C. A. page 171; see also, 2 Moore's Federal Practice §2630, page 1193.) Under the former statute depositions were uniformly admitted where the witness resided more than one hundred miles from the place of trial (*Patapsco Insurance Co. v. Southgate,* 5 Peters (30 U. S.) 604 (1831); *Anglo California Nat. Bank v. Lazard,* 106 F. 2d 693, 697 (9th Cir. 1939); *Nieman v. Plough Chemical Co.,* 22 F. 2d 73 (6th Cir. 1927); *Campbell v. Willis,* 290 Fed. 271 (Dist. Col. Cir. 1923); *Texas & P. Ry. Co. v. Reagan,* 118 Fed. 815 (5th Cir. 1902); Compare: *Whitford v. Clark County,* 119 U. S. 522 (1886)).

Similarly, under the Federal Rules of Civil Procedure and equivalent state provisions, where the conditions precedent are met, depositions are admitted as a matter of course (*Weiss v. Weiner,* 10 F. R. D. 387 (D. C. Md. 1950); *Aircraft Radio Industries v. M. V. Palmer,* 277 P. 2d 737, 45 Wash. 2d 737 (1954)), *if not as a matter of right* (*Richmond v. Brooks,* 227 F. 2d 490 (2d Cir. 1955); *Hiltibrand v. Brown,* 234 P. 2d 618, 124 Colo. 52 (1951)).

The deponent in the case at bar, Dr. Bergius, resided in Hong Kong, B. C. C. [R. 16; Ex. C][3] a distance greater than one hundred miles from Los Angeles, California, the place of trial and out of the United States.[4] Condi-

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[3]The residence of a witness at the time his deposition is taken will be presumed to continue unless the contrary is shown (*Whitford v. Clark County,* 119 U. S. 522 (1886); *Campbell v. Willis,* 290 Fed. 271 (Dist. Col. Cir., 1923)).

[4]This Court may take judicial notice of these facts (*Cf. DeWitt v. Wilcox,* 161 F. 2d 785, 787 (9th Cir., 1947), cert. den. 332 U. S. 763; *Ex parte Zimmerman,* 132 F. 2d 442, 445 (9th Cir., 1952), cert. den. 319 U. S. 744; *Aircraft Radio Industries v. M. V. Palmer,* 277 P. 2d 737, 740, 45 Wash. 2d 737 (1954)).

tions for receipt of his depositions were therefore clearly met. *Arnstein v. Porter*, 154 F. 2d 464 (2d Cir. 1946), relied upon by appellant, is clearly distinguishable. There, the defendant whose deposition was admitted resided "in the district and within a few miles of the place of trial" (154 F. 2d at p. 472). Moreover, the District Court in *Arnstein* had granted summary judgment for the defendant; whereas the Circuit Court of Appeals found a genuine issue of a material fact to exist. Since summary judgment will not lie under such circumstances (Rule 56, Federal Rules of Civil Procedure; *Fountain v. Filson,* 336 U. S. 681 (1949)), the court's discussion of the use of depositions would seem to be dicta.

Appellant raises the issue of

> "whether the depositions of an 'expert', expressing a medical opinion, is admissible where the 'expert' resides at a greater distance than 100 miles from the place of trial, even though a great number of equally qualified experts are available at the place of trial." (Br. 9).

Appellant apparently overlooks the fact that Dr. Bergius *did not testify solely as an expert.* His testimony was necessary to identify the radiograph which was made of appellant on March 14, 1951. There were no expert witnesses in the United States who could have identified this radiograph. Its identification was essential, because a more accurate determination of age based upon bone development is possible in the case of a younger child than an older one [R. 242; Ex. C, p. 8]. Moreover, Rule 26(d)(3), Federal Rules of Civil Procedure, draws no distinction between an expert and other witnesses. Nor should a difference be made here, especially since Dr.

Bergius possessed essential information which no expert in the United States possessed.

Appellant was not denied the right of cross-examination. A Notice of Taking Deposition on Oral Examination was filed and served on counsel for appellant on October 5, 1956 [R. 16]. No objection to this notice was interposed. Had appellant wished to avoid the expense of retaining counsel in Hong Kong to represent him at the taking of the deposition, he could have moved for an order of protection as authorized by Rule 30(b), Federal Rules of Civil Procedure. The Court below might then have compelled appellee to proceed upon written interrogatories. Appellant objected to the deposition for the first time at trial. It was then too late for appellee to secure the essential testimony of Dr. Bergius or to identify the radiograph attached to his deposition by other means. By his inaction appellant waived the right of cross-examination (26-A C. J. S. Depositions §68, p. 393; *Boatman v. Coverdale,* 80 Okl. 9, 193 Pac. 874 (1920)).

Appellant challenges the expert qualifications of Dr. Bergius as a ground for excluding his deposition. Exhibit C shows, however, that Dr. Bergius was a medical practitioner [Ex. C, p. 1], had made studies in the field about which he testified [Ex. C, p. 2], and had examined a considerable number of persons in order to determine their ages [Ex. C, p. 7]. It has been held that a physician is not incompetent to testify as an expert merely because he is not a specialist in the particular field of which he speaks (*Sher. v. De Haven,* 199 F. 2d 777, 782 (Dist. Col. Dir. 1952), cert. den. 345 U. S. 936). Moreover, whether a witness is qualified to give expert testimony is a matter resting largely within the discretion of the trial court, and its ruling thereon will not be disturbed on appeal

unless there was clear error (*Atchison, Topeka and Santa Fe Railway Co. v. Jackson,* 235 F. 2d 390, 393-394 (10th Cir. 1956); *E. L. Farmer & Company v. Hooks,* 239 F. 2d 547, 553 (10th Cir. 1956), cert. den. 353 U. S. 911; *Pacific Live Stock Co. v. Warm Springs Irr. Dist.,* 270 Fed. 555 (9th Cir. 1921); *Sher v. De Haven, supra*).

## II.

## The District Court Did Not Err in Concluding That Appellant Had Failed to Sustain His Burden of Proving His Claim to United States Nationality.

Appellee concedes that the burden of proof which plaintiffs must sustain in actions under Section 503 of the Nationality Act of 1940 is an ordinary one (*Wong Gong Fay v. Brownell,* 238 F. 2d 1 (9th Cir. 1956); *Chow Sing v. Brownell,* 235 F. 2d 602 (9th Cir. 1956); *Ly Shew v. Dulles,* 219 F. 2d 413, 416 (9th Cir. 1954)). This rule was recognized by the court below [see, Finding of Fact VII and Conclusion of Law II, R. 19-20]. However, it is equally clear that findings of fact by the trial court will not be set aside on appeal unless clearly erroneous (Rule 52(a), Federal Rules of Civil Procedure; *United States v. United States Gypsum Co.,* 333 U. S. 364, 395 (1948); *Lew Wah Fook v. Brownell,* 218 F. 2d 924 (9th Cir. 1955), cert. den. 349 U. S. 944; *Attorney General of the United States v. Ricketts,* 165 F. 2d 193 (9th Cir. 1947)).

Appellant claims to have been born on April 30, 1935 [R. 5]. On March 14, 1951, when according to his claimed birthdate he would have been 15 years, 10 months, and 14 days of age, a radiograph of his bones was taken [see radiograph attached to Ex. "C"]. Dr. Bergius concluded from this radiograph that appellant was then only 9 to 10 years old [Ex. C, p. 5]. Dr. George Jacobson,

*an expert witness called on behalf of the appellant,* concluded from the same radiograph that appellant was between 10 and 11 years of age [R. 240-241, 243, 248-249].[5]

On January 31, 1952 appellant's counsel had an X-ray made of him at the X-ray laboratory of Dr. Maurice Robinson, San Francisco, California [R. 239; Ex. 13]. According to his claimed birthdate, appellant would then have been 16 years, 9 months, and 1 day old. Yet, at trial Dr. Jacobson testified that based upon this X-ray appellant was at that time approximately 12 years and 6 months of age [R. 241].

Dr. Jacobson gave the normal variant for the age of 10 as two years in either direction [R. 249]. In response to a question by the court as to whether the X-rays taken on March 14, 1951 could indicate a boy of 15 he stated [R. 250]:

> "The Witness: I would say this, sir. If this boy [276] is stated to me to be 15, then *I would say these X-rays are definitely abnormal."* (Emphasis added.)

Again, referring to the X-ray taken on January 31, 1952, Dr. Jacobson testified [R. 252]:

> "Q. That is still abnormal? A. Yes.
>
> Q. But that is closer to the normal age than the picture reflected by the March 1951 X-ray? A.

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[5]In this connection Dr. Jacobson stated [R. 248-249]:

> "The Witness: I would have, according to these standards that we have here, your Honor, I would have placed him somewhere between the ages of 10 and 11, which is not too far off from nine and 10. I would say according to these pictures here, *he is probably closer, he fits closest to the 10 year standard* and possibly between the 10 and 11. He doesn't fit very well the nine year standard at all." (Emphasis added.)

> *Slightly, not much more than slightly.* If you tell me this boy is 16½ and his bone age corresponds to roughly 12½, or the absolute maximum on this film here of 13 years and 3 months, but more closely to that of 12 years and 6 months, there is a four-year discrepancy, which is somewhat beyond normal expectation." (Emphasis added.)

Thus, the finding of the District Court that appellant was "considerably younger than his claimed age" [R. 19] is supported not only by the deposition of Dr. Bergius and the radiograph annexed thereto [Ex. C], but by the X-ray introduced in evidence by appellant [Ex. 13] and the testimony of appellant's own expert as well.

The courts have sanctioned denial of a claim to citizenship where an age determination *based upon scientific evidence and expert testimony* showed the claimant to be older or younger than his purported age.

*United States ex rel. Mark Guey Him v. Reimer,* 115 F. 2d 241 (2d Cir. 1940);

*Kong Din Quong v. Haff,* 112 F. 2d 96 (9th Cir. 1940), cert. den. 311 U. S. 706;

*Hom Ark v. Carr,* 105 F. 2d 607 (9th Cir. 1939);

*United States ex rel. Fong On v. Day,* 54 F. 2d 990 (2d Cir. 1932);

*United States ex rel. Eng Fon Sing v. Reimer,* 40 Fed. Supp. 602 (S. D. N. Y. 1940), affd. 122 F. 2d 552 (2d Cir. 1941), cert. den. 314 U. S. 689;

*United States ex rel. Chung Yuen Poy v. Corsi,* 2 Fed. Supp. 260 (S. D. N. Y. 1932), affd. 62 F. 2d 777 (2d Cir. 1933);

*United States ex rel. Chin Cheung Nai v. Corsi,* 55 F. 2d 360 (S. D. N. Y. 1931), affd. 64 F. 2d 1022 (2d Cir. 1933).

As this Court in *Hom Ark v. Carr, supra,* observed (p. 610):

> "X-ray pictures are not, of course, an infallible means of determining age. No one claims that they are. Nevertheless, to a medical expert, such pictures may be a valuable aid in arriving at an opinion on that subject. * * *"

And as the Court in *United States ex rel. Chin Cheung Nai v. Corsi, supra,* pointed out (p. 360):

> "The contention that the medical evidence as to the age of a person is so unreliable as necessarily not to be dependable is without merit."

*Carmichael v. Wong Choon Ock,* 119 F. 2d 173 (9th Cir. 1941), rehearing denied 122 F. 2d 829, is distinguishable. In that case no X-rays were used, but the so-called "experts" relied solely upon their observation of the applicant. That a different result would have obtained had the age determination been based upon scientific evidence was indicated by Judge Denman in his opinion denying the petition for rehearing (122 F. 2d at p. 829):

> "* * * *No doubt my bones would have shown their development to the experts.* At fourteen I was tough fibered enough to take the gaff of days of duck shooting with the market hunters in the San Joaquin delta, the pelagic sealers who wintered there." (Emphasis added.)

The District Court found that appellant Wong Kwok Wei had failed to establish his burden of proving his claim to citizenship [R. 19-20] while declaring his alleged brother, Wong Kwok Keung to be a citizen [R. 24-25]. The record discloses grounds for this difference in conclusion other than appellant's age discrepancy.

Where one claims derivative citizenship under Section 1993 of the Revised Statutes of the United States, he and/or his claimed relatives would normally be expected to have in their possession, letters, photographs, or other documents of sufficient age to attest to the bona fides of the claimed relationship. Wong Kwok Keung appeared on a group photograph which was taken in 1934 with his parents and one of his brothers [Ex. 3-C; R. 48, 111-112, 184]. He also is shown on a photograph with his mother [Ex. 3-D; R. 116-117, 138] and on a group photograph of alleged members of the family [Ex. 3-E; R. 51, 112, 138, 185-186]. The only group photograph on which appellant purportedly appears is Exhibit 3-E, which was taken in 1949 only a short time before appellant applied to come to the United States as a citizen.

All of the letters comprising Exhibit 3-H-1 were addressed to Wong Kwok Keung, with the exception of one which was addressed to his mother [R. 118-120, 139-140]. Not a single letter was offered in evidence, either to or from the appellant. Appellant neither wrote to his alleged father and brothers in the United States nor received any letters from them [R. 165-166]. All of the receipts indicating that money was sent to China show that the money was sent to Wong Kwok Keung [Ex. 3-H-2; R. 121, 140-141]. In addition, Wong Kwok Keung produced a letter and student card from Lingnan University, which documents bore his photograph [Exs. 3-F and 3-G; R. 117].

It should also be noted that appellant and his alleged younger brother, Wong Kwok Jin, were not living in the family home in 1947, but were living in the "community house" [R. 194, 210, 212]; and appellant's alleged father, Wong Ho, indicated an unwillingness to submit

to a blood test in connection with appellant's claim [R. 204]; although the evidentiary value of the latter fact may be questionable in view of *Fong Sik Leung v. Dulles,* 226 F. 2d 74 (9th Cir. 1955).

While the District Court did not expressly comment upon the difference in evidence as between appellant and his alleged brother, his finding that appellant "has not sustained his burden of proving that he is the true and lawful blood son of Wong Ho" [R. 19] would seem to be sufficiently broad to encompass this difference. Moreover, if the decision of the court below is correct, it must be affirmed, although the District Court may have relied on the wrong ground or may have given the wrong reason (*Helvering v. Gowran,* 302 U. S. 238 (1937); *Kam Koon Wan v. E. E. Black, Limited,* 188 F. 2d 558 (9th Cir. 1951)).

## Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
*United States Attorney,*

RICHARD A. LAVINE,
*Assistant U. S. Attorney,*
*Chief of Civil Division,*

JAMES R. DOOLEY,
*Assistant U. S. Attorney,*

*Attorneys for Appellee.*